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No. 99-1844

In the Supreme Court of the United States

Supreme Court, U.S.
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IN RE POTASH ANTITRUST LITIGATION

HAHNAMAN ALBRECHT, INC., ET AL.,
PETITIONERS,

v.

POTASH CORPORATION OF SASKATCHEWAN, INC., ET AL.
RESPONDENTS.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

RESPONDENTS' SUPPLEMENTAL BRIEF

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RESPONDENTS' SUPPLEMENTAL BRIEF

Pursuant to Rule 15.8 of the Rules of this Court. respondents submit this supplemental brief to address matters raised in the *amicus* brief filed by Alabama, *et al.* ("the States"), in support of the petition for certiorari in this case.

Comparing the petition with the brief submitted by the States reveals that petitioners and their *amici* make very different and substantially inconsistent arguments. The States submit that the "tends to exclude" rule of *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574 (1986), applies only when the alleged conspiracy is economically implausible. Petitioners, by contrast, have abandoned that argument and instead appear to assert — insofar as their submission on the point is intelligible — that the "tends to exclude" rule applies in *all* cases, but that it requires only that the plaintiffs' evidence be *consistent* with conspiracy. That petitioners and their *amici* cannot agree on what is wrong with the court of appeals' decision confirms our point: there is nothing wrong with that decision at all.

1. The States' principal argument is that the circuits are in conflict on whether the *Matsushita* test applies only when the plaintiffs' conspiracy allegation is implausible as a matter of economics. States' Br. 4-8. But this contention cannot support the grant of certiorari because, as we note in the brief in opposition (at 12), it is not an argument that is advanced in the petition. And the States' claim is, in any event, patently wrong. As we also explain in the brief in opposition (at 15-16 & n.4), the courts of appeals have now *uniformly* rejected the view that the "tends to exclude" standard governs only implausible conspiracy allegations. Thus the Third Circuit, to whose views the States call special attention (at Br. 6, 7-8), has held unequivocally that, "*even with a plausible motive to conspire*, ambiguous conduct will not create a triable issue of fact with respect to the existence of a conspiracy." *Rossi* v. *Standard Roofing, Inc.*, 156 F.3d 452, 466 (3d Cir. 1998) (emphasis added). See also *In re Baby Food Antitrust Litig.*,

166 F.3d 112, 123-124 (3d Cir. 1999) (applying "tends to exclude" standard to allegations of horizontal price fixing). Similarly, the Sixth and Seventh Circuits, whose decisions also are cited by the States (at Br. 7), likewise have applied the *Matsushita* "tends to exclude" standard to perfectly "plausible" allegations of anticompetitive conduct. See, *e.g.*, *American Council of Certified Podiatric Physicians & Surgeons* v. *American Bd. of Podiatric Surgery, Inc.*, 185 F.3d 606, 611-612, 619 (6th Cir. 1999) (applying "tends to exclude" rule to allegation that horizontal competitors conspired to "reduce plaintiff's presence as a competitor in the market");[1] *Reserve Supply Corp.* v. *Owens-Corning Fiberglass Corp.*, 971 F.2d 37, 49 (7th Cir. 1992) (applying "tends to exclude" rule to allegations of horizontal price fixing).

As we have explained, the Court has denied certiorari repeatedly when faced with petitions presenting precisely this allegation of a conflict. See Br. in Opp. 1-2. Indeed, the State of California, one of the state *amici* in this case, also filed as an *amicus* in support of the petition in *Gangi Bros. Packing Co.* v. *Cargill, Inc.*, No. 99-1218, making exactly the same allegation of a split in the circuits that it advances now. See

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[1] *Ezzo's Invs., Inc.* v. *Royal Beauty Supply, Inc.*, 94 F.3d 1032 (6th Cir. 1996), which is cited by the States (at Br. 7), is not to the contrary. There, the court pointed to *direct* evidence that the plaintiff "was asked to fix prices and that he was cut off for not doing so"; noted that *Matsushita* asks whether the plaintiff's evidence "tends to exclude" the possibility of independent action; and found that "[i]n this case, [the plaintiff's evidence] has done just that." 94 F.3d at 1035, 1036. Although the court also observed that the plaintiff's claim in *Ezzo's* was plausible, it did so in addressing *Matsushita*'s discussion of ordinary summary judgment rules, *not* its analysis of the substantive antitrust law that "limits the range of permissible inferences from ambiguous evidence in a [Sherman Act] § 1 case." *Matsushita*, 475 U.S. at 588. See Br. in Opp. 11-12.

No. 99-1218, Br. of State of California, at 3-8. The Court denied review. 120 S. Ct. 1531 (2000). Unlike a fine Camembert, California's arguments have not improved with age.

2. Entirely apart from the question whether the circuits are in conflict, the States are incorrect in asserting that *Matsushita* meant its rule to apply only to "economically implausible allegations." States' Br. 10; see *id.* at 3-4, 10-12. Again, this argument is wholly beside the point because it is not advanced in the petition. See Br. in Opp. 12. And the reason for that omission is plain: the States' contention is patently wrong. While the predatory pricing conspiracy alleged in *Matsushita* may in fact have been implausible as a matter of economics, the Court in that case expressly rejected the *very argument* advanced by the States here:

> [w]e do not imply that, if [the defendants] had had a plausible reason to conspire, ambiguous conduct could suffice to create a triable issue of conspiracy. Our decision in *Monsanto Co.* v. *Spray-Rite Corp.*, 465 U.S. 752 (1984), establishes that conduct that is as consistent with permissible competition as with illegal conspiracy does not, without more, support even an inference of conspiracy. *Id.* at 763-764.

Matsushita, 475 U.S. at 597 n.21. And as we explained in the brief in opposition (at 11-12), the Court's decision in *Eastman Kodak Co.* v. *Image Technical Services, Inc.*, 504 U.S. 451 (1992), did not change the *Matsushita* analysis at all.

3. The States are similarly incorrect in asserting that the courts below engaged in an improper, "piecemeal" method of analyzing the evidence. States' Br. 12-13. In fact, the district court expressly acknowledged that it "should not compartmentalize the evidence that is proffered by an antitrust plaintiff but, rather, should analyze the plaintiff's showings as a whole so as to determine if, in its integrated entirety, the

evidence supports an inference of concerted action." Pet. App. A124. The district court added that, although it "follow[ed] the Plaintiffs' lead in compartmentalizing [its] discussion of the evidence, [it] * * * carefully reviewed this evidence as a blended whole, * * * so as to ascertain whether an 'inference of conspiracy is reasonable in light of the competing inference of independent action.'" *Id.* at A134-A135 (citation omitted). The court of appeals affirmed that approach. Needless to say, that the courts below addressed petitioners' evidentiary submissions in the order in which petitioners presented them hardly means that those courts improperly "compartmentalized" the evidence. As the Second Circuit put it in identical circumstances:

> [a]lthough the logical presentation of our holding has required us to treat each of [the plaintiff's] claims of anticompetitive conduct separately, we have not ignored [the rule of *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962), that the evidence not be compartmentalized.] We have found, however, that in numerous critical respects [the plaintiff's] proof was utterly lacking. Under such circumstances, treating [the plaintiff's] claims collectively cannot have any synergistic effect.

Northeastern Tel. Co. v. *American Tel. & Tel. Co.*, 651 F.2d 76, 95 n.28 (2d Cir. 1981).

4. Like petitioners, the States ratchet up the hyperbole in contending that the Eighth Circuit's decision "create[s] a virtually insurmountable barrier to the successful prosecution" of antitrust conspiracies by making it impossible for "an antitrust plaintiff [to] rely on circumstantial evidence of the alleged conspiracy." States' Br. 1, 9. Also like petitioners, however, the States fail to explain just where in its opinion the court of appeals issued this remarkable holding. The reason, of course, is that the court held no such thing. As we explain

in the brief in opposition, the Eighth Circuit explicitly acknowledged that antitrust plaintiffs *may* rely on circumstantial evidence, invoked the *Matsushita* "tends to exclude" standard, and held petitioners' case inadequate because their evidence was "far too ambiguous" to be probative of conspiracy. Br. in Opp. 13-14, 22. For its part, the district court likewise expressly noted that "'the inferences to be drawn from the underlying facts * * * must be viewed in the light most favorable to the party opposing the [summary judgment] motion,'" going on to reject petitioners' claims under this standard only because petitioners' case rested on "unreasoned speculation." Pet. App. A122, A135 (citation omitted). The States, like petitioners, are unable to show what is wrong with these fact-bound applications of established law.

5. Finally, the States — which did not participate below and plainly are unfamiliar with the record here — do not even attempt to explain why this case would be a suitable one in which to address the issues they present. In fact, as we note in the brief in opposition (at 24-26), this case is highly atypical because the governments of the United States and Saskatchewan intentionally *forced* a price increase; because the government of Saskatchewan made it virtually impossible for Canadian potash producers to undercut one another's prices; and because the courts below rejected the opinion of petitioners' expert as "fundamentally unreliable." Pet. App. A19. In these circumstances, petitioners — who bear the burden of proof — could not hope to establish their claim of price-fixing under any reasonable standard. If the States seek to change the rules of *Matsushita* and *Monsanto* to make it easier for insubstantial antitrust claims to survive summary judgment, they should wait for a case in which their arguments could affect the outcome. That is not true of the entirely speculative claims advanced by petitioners here.

CONCLUSION

For the foregoing reasons and those presented in the brief in opposition, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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